IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 442 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DHIREN JAYANTILAL SHAH - Applicant(s)

Versus

CHETNA DHIRENBHAI SHAH & 1 - Respondent(s)

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Appearance :

MR HARSHIT S TOLIA for Petitioner No(s).: 1.

MR MP SHAH for Respondent No(s).: 1.
MS. KRUTI M SHAH for Respondent No(s).: 1.
MR KOGJE, Ld. APP for Respondent No(s).: 2.

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CORAM :HON'BLE MR.JUSTICE JAYANT PATEL

Date : 30/06/2005

ORAL JUDGMENT

1. **Rule**. Ms.Shah, learned Counsel for Respondent No.1 waives service of notice of Rule and Mr.Kogje, learned APP waives service of notice of Rule on behalf of Respondent No.2. With the consent of the parties the matter is taken up for final hearing today.

2. The short facts of the case are that the Respondent No.1, who is the wife preferred application under Section 125 of Cr. P.C., for maintenance at the rate of Rs.2,000/- for herself and Rs.2,000/- for the daughter, total Rs.4,000/- per month from the petitioner, who is the husband. The respondent for herself and for her daughter preferred interim application for maintenance at the rate of Rs.2,000/- plus Rs.2,000/-, total Rs.4,000/- per month. The learned Magistrate after hearing both the sides passed the order on 27.1.2004, whereby the application has been partly allowed and the maintenance to the wife of Rs.400/- per month and the maintenance to the daughter of Rs.300/- per month total Rs.700/- per month is ordered to be paid

from the date of the application until final order. It appears that the petitioner herein has also preferred Hindu Marriage Petition (HMP) for declaration that the marriage is a nullity and the said petition is registered in the Court of Civil Judge (S.D.), Bhavnagar as HMP-121/2003. It also appears that the wife who is opponent in the proceedings of HMP, preferred application under Section 24 of the Hindu Marriage Act for interim alimony and the cost of the litigation and it was prayed for interim maintenance of Rs.3,000/- per month and Rs.10,000/- towards cost of litigation. The aforesaid application was submitted on 1.1.2001. It also appears that thereafter the learned Civil Judge below the application for interim alimony has passed the order on 28.1.2004, whereby it is ordered to pay the maintenance of Rs.1,500/- per month to the wife and the daughter pending the petition and for the miscellaneous expenses, it is ordered to pay Rs.500/- to the wife. It appears that the petitioner herein preferred the revision before the learned Sessions Judge against the order

of the learned Magistrate ordering for interim maintenance of Rs.700/- per month. It was contended by the petitioner in the proceedings of the revision before the learned Sessions Judge that in view of the order passed by the Civil Court in the proceedings of HMP for interim alimony, the adjustment is required to be given and the petitioner would not be required to pay the amount as ordered by the learned Magistrate. It appears that the learned Sessions Judge found that no illegality is committed by the trial Court and it is also found that the trial Court has not declined to adjust the amount and as the amount is not more it appears that the adjustment is not made and it is found by the learned Sessions Judge that no illegality is committed by the trial Court and, therefore, the revision is dismissed. It is under these circumstances the petitioner has approached this Court by preferring this petition.

3. Heard Mr.Tolia, learned Counsel for the petitioner and Ms.Shah, learned Counsel for the respondent No.1

and Mr.Kogje, learned APP for Respondent No.2 State.

4.Mr.Tolia, learned Counsel for the petitioner submitted that when the order is already passed by the learned Civil Judge for interim alimony, the petitioner cannot be compelled to make the payment of both the amounts namely; the amount ordered by the learned Civil Judge as well as the amount as ordered by the learned Magistrate and, therefore, he submitted that in any case, the petitioner would be entitled to the adjustment of the amount or in alternative, as the order is already passed by the learned Civil Judge for interim alimony, the learned Sessions Judge ought to have considered that the order passed by the learned Magistrate for payment of the maintenance deserves to be interfered with or in any case, would not survive. He, therefore, submitted that the order passed by the learned Magistrate as well as its confirmation by the learned Sessions Judge either deserves to be clarified or deserves to be quashed.

5.On behalf of the respondent wife, it has been

submitted by learned Ms.Shah that on 28.1.2004 when the learned Sessions Judge passed the order for interim maintenance, written submissions were made and at para 17 it has been, inter alia, stated that the learned Magistrate on 27.1.2004 has passed the order for interim maintenance at the rate of Rs.700/- per month. Therefore, it is submitted that when the learned Sessions Judge has passed the order after taking into consideration the order for maintenance passed by the learned Magistrate, the petitioner would not be entitled to the adjustment of the amount and he would be required to comply with the orders. It is, therefore, submitted that the order passed by the learned Magistrate as well as its confirmation thereof by the learned Sessions Judge, cannot be said to be illegal.

6. Having considered the above, it appears that the HMP is filed on 20-12-2003 in the Civil Court, whereas the application under Section 125 of Cr. P.C. Before the learned Magistrate was filed on 18.10.2003. Therefore, the proceedings of the maintenance under

Section 125 of Cr.P.C., are prior in point of time. Further, the interim maintenance ordered by the learned Magistrate below the application of the wife was also on 27.1.2004, whereas the learned Civil Judge has passed the order of interim alimony on 28.1.2004 and, therefore, the order passed by the learned Magistrate for ordering interim maintenance of Rs.700/- per month is also prior in point of time and the order of the learned Civil Judge under Section 24 of the Hindu Marriage Act is of later date. Therefore, when the learned Magistrate passed the order on 27.1.2004, the order of learned Civil Judge dated 28.1.2004 was not at all in existence and under these circumstances, if the matter is strictly considered, it cannot be said that the learned Magistrate has committed any error of jurisdiction while passing the order for interim maintenance. Therefore, the scope of judicial scrutiny, if it is strictly viewed in the proceedings of the revision, as such would not be there when the interim order is passed by the learned Magistrate. In normal circumstances, while

exercising the revisional power, the Sessions Court may not interfere when the challenge is against the interim order, more particularly when such an interim order cannot be said to be seriously prejudicing the rights of the petitioner. When interim order is passed for interim maintenance pending the proceedings under Section 125 unless the order is ex-facie perverse or harsh, it would not be within the scope and ambit of the learned Sessions Judge while exercising the revisional jurisdiction to interfere.

7. Apart from the above, on the date when the learned Magistrate passed the order, if the order of the learned Civil Judge was not in existence below application under Section 24 for interim alimony, even otherwise also, as it is it could not be said that any jurisdictional error was committed by the learned Magistrate and, therefore, the learned Sessions Judge was within his jurisdiction to reject the revision application of the petitioner.

8. The grievance raised on behalf of the petitioner

that the prayer was essentially for the adjustment of the amount, which has not been considered by the learned Sessions Judge, is in my view, ill-founded in as much as the adjustment, if any, is to be granted, the same would be in the latter proceedings and not in the proceedings which are in prior point of time. As observed earlier the proceedings of HMP, including the interim order for interim alimony are in later point of time in comparing to the proceedings under Section 125 and, therefore, the adjustment, if any, is to be given, the same would be when the Civil Court considered the matter for interim alimony under Section 24 of the HM Act. Therefore, it cannot be that the view expressed by the learned Sessions Judge that the learned Magistrate has not declined to adjust the amount is not proper exercise of the discretion vested to him and, therefore, the order passed by the learned Sessions Judge of negating the said contention of the petitioner on the ground of adjustment of the amount cannot be said as an error apparent on the face of record which may be called for interference

by this Court in exercise of power under Article 227 of the Constitution.

9. Even on the aspects of the adjustment as recorded hereinabove, it has been submitted on behalf of the respondent wife that in the written submission the order passed by the learned Magistrate for ordering maintenance of Rs.700/- per month is declared. However, it appears that in the order passed by the learned Civil Judge for interim alimony it is not clear as to whether the said aspect is considered by the learned Civil Judge or not. As the legality and validity of the order dated 28.1.2004 passed by the learned Civil Judge below application for interim alimony is not the subject matter of this petition, nor the said order is under challenge before this Court, I find it proper to leave the matter at that stage without observing anything further and leaving the parties to resort to appropriate remedies as may be permissible in law.

10. In view of the above, the petition fails. Considering the facts and circumstances, the

petitioner would also be required to pay the cost of the present litigation before this Court which is quantified at Rs.2,500/- and the petitioner shall pay the said amount to the respondent No.1 within a period of one month from today. Rule discharged.

11.Mr.Tolia, learned Counsel for the petitioner at this stage prayed that the interim stay granted by this Court may be continued for some time until the petitioner moves appropriate application to the Civil Court in the proceedings of HMP and he further states that the petitioner shall deposit all the arrears and the cost of the litigation within a period of four weeks from today. In view of the aforesaid declaration, the interim order passed by this Court shall continue for four weeks, on condition to comply with the aforesaid declaration to deposit the amount.

30-6-2005 **(Jayant Patel, J.)**

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